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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Analytical study focusing on gender-based and sexual violence in relation to transitional justice

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

Focusing on gender-based and sexual violence in relation to transitional justice in conflict and post-conflict situations, the present study covers the effective participation of victims and the participatory procedures necessary to address the different needs and opportunities of women, men, girls and boys, as well as good practices with regard to national consultations, truth-seeking, criminal justice, reparations and institutional reform. It contains illustrative examples as well as suggested opportunities for further improvements.

While there has been notable progress, more efforts are needed to ensure that transitional justice processes address the full spectrum of gender-based and sexual violence. Various bodies and institutions may gain new ideas from the approaches, sometimes novel, outlined in the present study.

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I. Introduction

1. In its resolution 21/15, the Human Rights Council requested the United Nations High Commissioner for Human Rights to submit to the Council, prior to its twenty-seventh session, an analytical study focusing on gender-based and sexual violence in relation to transitional justice in conflict and post-conflict situations, the effective participation of victims and the participatory procedures necessary to address the different needs and opportunities of women, men and children, including good practices of States in the field of truth-seeking, justice, reparation and institutional reform.

2. The Office of the United Nations High Commissioner for Human Rights (OHCHR) asked for contributions for the study. Information was provided by Algeria, Argentina, Colombia, Cuba, France, Germany, Georgia, Guatemala, Iraq, Serbia, Slovakia and Switzerland, as well as by Redress.[1] The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, the Special Rapporteur on violence against women, its causes and consequences, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the Special Representative of the Secretary-General on Sexual Violence in Conflict and the Special Representative of the Secretary-General for Children and Armed Conflict were consulted in the preparation of the study.

II. Gender-based and sexual violence in relation to transitional justice

3. Gender-based violence is considered to be any harmful act directed against individuals or groups of individuals on the basis of their gender.[2] Gender-based violence may include sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices. Sexual violence is a form of gender-based violence and encompasses "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting".[3] Sexual violence takes multiple forms and includes rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity.

4. An understanding and analysis of how gender intersects, for instance, with race, religion, economic situation, political affiliation and geography is also critical to understanding and addressing patterns and forms of gender-based violence. In some contexts, it is also important to take into consideration violence perpetrated against persons perceived as not conforming to traditional notions of masculinity or femininity, including lesbian, gay, bisexual and transgender persons.

5. Although men and boys are also targets of gender-based and sexual violence in conflict situations, the victims of such violence continue to be disproportionally women and girls. Experience shows that in conflict and post-conflict situations, and in periods of

[1] The full text of the replies is available from the secretariat.

[2] See the Guidelines for Gender-Based Violence Interventions in Humanitarian Settings, issued by the Inter-Agency Standing Committee 2005. See also the Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992).

[3] United Nations Action against Sexual Violence in Conflict, citing the World Health Organization, in "Analytical and conceptual framing of conflict-related sexual violence" (2011), p. 1.

political or civil strife and instability, women and girls are exposed to heightened risks of violations of their human rights and higher levels of violence, including sexual violence. Trafficking in women and girls can be exacerbated owing to the breakdown of political, economic and social structures, increased militarism and related demands for women's sexual, economic and military exploitation.[4] During armed conflict, sexual violence is often used as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.[5] Ethnic cleansing and the destruction of the fabric of family and community are often also part of the deliberate strategies of warring parties.[6]

6. For the United Nations system, transitional justice comprises the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.[7] Furthermore, comprehensive national consultations, particularly with those affected by human rights violations, have been recognized as critical element of transitional justice.[8]

7. Addressing gender-based and sexual violence in societies transitioning from conflict or repressive rule is vital to ensuring accountability and sustainable peace. Transitional justice processes can help to realize the rights of victims of such violence and can be instrumental in identifying and dismantling the underlying structural discrimination that enabled it to occur. As such, it is important to ensure that victims of gender-based and sexual violence are consulted effectively, that they receive adequate redress for violations, that women can fully participate in transitional justice processes and that their rights and perspectives are adequately reflected therein.

8. There has been an increased focus on the effective participation of victims in transitional justice processes, and the participatory procedures necessary to address the different needs of and opportunities for women, men, girls and boys. Security Council resolution 1325 (2000) and subsequent Council resolutions on women, peace and security, including resolution 2122 (2013), recognized the need to include women in all aspects of peacemaking, post-conflict reconstruction and peacebuilding. This includes the design, implementation and evaluation of transitional justice processes,

III. National consultations

9. National consultations are a critical element of the human rights-based approach to transitional justice, and are founded on the principle that successful strategies require meaningful public participation. Consultations around the design, implementation and evaluation of transitional justice mechanisms are key to ensuring that those mechanisms are relevant and empowering to those affected by them. Without the consultation and participation of women and girls, transitional justice initiatives are likely to reflect only men's concerns, priorities and experiences of violence and to largely overlook gender-

[4] Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013), para. 39.

[5] Security Council resolution 1820 (2008).

[6] UN-Women. *A Window of Opportunity: Making Transitional Justice Work for Women* (2012), p. 2.

[7] S/2004/616, para. 8.

[8] See the Guidance note of the Secretary-General on the United Nations approach to transitional justice (2010).

based and sexual violence. In Timor-Leste, it was only when women were consulted that prosecutors began to pay attention to sexual-violence crimes.[9] Similarly, consultations are necessary to create transitional justice processes that are sensitive to women's particular needs, their priorities and their social and cultural contexts. Further, national consultations can themselves be an important tool of empowerment, recognition and redress for victims. Consultations with groups that are often silenced or marginalized, such as women, children, the elderly, and ethnic, racial or religious minorities, also sends a strong signal about equal rights in the post-conflict context, which itself has transformative social potential.

10. Representation of a cross section of women and girls in all their diversity must be ensured during consultations. Consultations with women should not solely focus on their experience of victimization, but should take account of the evolution of gender roles during and after conflict and the multiple roles women play in such situations. By highlighting women's roles as vital contributors to the economy, household heads, guardians and agents of change in their communities, consultations can maximize their potential to empower women and challenge prejudices.

11. There is often a need to address the practical obstacles faced by women, men, girl and boy victims of gender-based and sexual violence in participating in consultation processes. For instance, to express free and frank opinions, women should be consulted separately from men and, as appropriate, by other women and without haste. Protections from backlash and stigmatization, including strict safeguards of confidentiality and anonymity, are essential. To avoid re-traumatizing victims, consultations must be held in safe, neutral spaces by people trained in working with victims of gender-based and sexual violence. This is particularly critical when consulting children, which should generally only be done by specially trained personnel.[10] The reluctance of victims to disclose their experiences may be compounded in countries where there is little awareness that gender-based and sexual violence is criminal, or where victims may face counter-charges of adultery or morality-related offences for bringing a sexual violence claim. Sensitization efforts giving local populations necessary information about transitional justice processes can play an important role in that regard. More efforts are also needed to understand and address the particular barriers that male, lesbian, gay, bisexual and transgender persons and other marginalized victims of sexual violence may face in coming forward in consultations.

12. Attention must also be paid to obstacles that women and girls may face in participation. Those include low literacy levels, discussions being conducted in a language different to their common vernacular or too far from their homes, the cost of attending consultations, including in lost labour and childcare time, and a lack of identity documents. Measures such as using local dialects and providing childcare assistance can help address those issues.[11] Conducting decentralized consultations, including in remote locations, is a particularly important element in supporting women's participation and in ensuring that a diversity of women are consulted. In the Democratic Republic of the Congo, for instance, OHCHR convened a high-level panel in 2011 that visited six communities around the country and met with local and provisional government authorities and with victims, non-governmental organizations and other United Nations agencies in order to ascertain victims' views on reparations.[12]

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[9] *Rule-of-Law Tools for Post-conflict States: National Consultations on Transitional Justice* (United Nations publication, Sales No. 09.XIV.2), p. 20.

[10] *National Consultations*, pp. 20–21.

[11] UN-Women, *A Window*, p. 4.

[12] See the report of the High-level Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of the Congo (2011).

13. As women and children make up the vast majority of persons displaced by conflict, efforts should also be made to consult in camps for internally displaced persons and refugees. Some initiatives in this area include the consultation of Sierra Leonean refugees in Guinea in 1999, of Timorese refugees in Indonesia in 2000,[13] and of internally displaced persons in Darfur in 2010 in relation to the Doha peace process. However, more efforts are needed.

14. Women's groups and other local networks can play an invaluable role in reaching and engaging victims. However, care must be taken in ensuring that civil society intermediaries truly represent victims' views, not their own agenda or that of a narrow subgroup of victims,[14] for example urban or well-educated women only. While consultations with children should make use of schools, clubs, child protection agencies and other networks for outreach and engagement, experience suggests that for children to speak frankly, they should be consulted in the absence of adult intermediaries.

IV. Truth-seeking processes

A. Truth commissions

15. Truth commissions play an important role in addressing not only sexual violence, but also other forms of gender violence. Truth commissions are often well placed to reflect the systematic nature of sexual violence, particularly where it is used as a method of warfare. In situations where there is social stigma attached to sexual violence, incorporating a gender perspective into the work of a truth commission will also help to break down that stigma and change societal attitudes regarding sexual violence. There may not be sufficient understanding of the long-term impact of such violence, including as suffered by girls and boys. Sensitizing the population to the work of truth commissions through an outreach programme is an important element in that regard.

16. A specific gender perspective, including attention to gender-based and sexual violence, was absent from the work of some early truth commissions.[15] Some of the more recent commissions have successfully integrated closer attention to gender-based and sexual violence in their work and supported the participation of women and girls.[16] That included creating a specialized gender unit within a commission; incorporating the issue of gender-based and sexual violence into their operational structure and rules of procedure, even where that was not specified in the formal mandate of the commission; ensuring the representation of women as commissioners, at expert levels and as staff; supporting a communication and outreach process that emphasizes that gender-based and sexual violence is within the ambit of the commission and should be reported; and conducting analysis and elaborating specific findings and recommendations regarding sexual violence or gender-based discrimination in their final reports.[17]

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[13] *National Consultations*, p. 21.

[14] Ibid., p. 22.

[15] A/HRC/24/42, para. 36. See also Vasuki Nesiah and others for the International Center for Transitional Justice, *Truth Commissions and Gender: Principles, Policies and Procedures* (2006).

[16] See *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004), chap. 2; *Final Report of the Truth and Reconciliation Commission of Liberia*, vol. 2, *Consolidated Final Report*; and *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, part 7, chaps. 7.7 and 7.8, and part 11.

[17] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (2011), p. 85.

17. The truth commissions in Guatemala, South Africa and Peru, which were pioneers in addressing gender-based and sexual violence, have been important reference points for later commissions. In Peru, for instance, the truth commission established a specific gender unit, and dedicated two chapters of its final report to gender issues, including gender-based and sexual violence.[18] Other important examples of truth commissions that addressed gender-based and sexual violence include those in Kenya, Liberia, Morocco, Sierra Leone, Solomon Islands and Timor-Leste.

18. While dedicated attention to sexual violence continues to be critically important, there is growing acknowledgement that truth commissions have a unique role to play in uncovering the root causes of such violence and the complexity of its effects. The report of the Kenyan truth commission includes a lengthy chapter on sexual violence, and another on gender and gross violations of human rights, in which the commission explored patterns of discrimination and displacement, as well as the record of women's political participation and their historical role in peacemaking.[19]

19. Incorporating issues of gender-based and sexual violence into the work of a truth commission, including research, outreach, statement taking and report writing, requires a considerable commitment in the context of a truth-seeking mandate that is already challenging.[20] This may also include consideration of the economic, social and cultural dimensions of violations that disproportionately affect women, children and other specific groups.[21] In Peru, the truth commission explored gender dimensions of the economic causes and consequences of violations, including the displacement of women and children and the rise in the number of female-headed households.

20. In Sierra Leone, the truth commission addressed violations of economic, social, cultural, civil and political rights and looked at linkages between pre-existing gender inequality and the gender-based and sexual violence that was prevalent during that country's civil war. In its report, the truth commission made broad recommendations aimed at transforming gender relations, including through law reform; improvements to women's access to justice; abolishment of discriminatory customs; education programmes; and the economic empowerment of women. Furthermore, the truth commission in Guatemala concluded that sexual violence was systematically directed at rural Mayan women during the conflict.

21. A number of factors may support a commission's capacity to undertake a gender-sensitive analysis and the likelihood that it will do so. While it is certainly possible for a commission to give sustained attention to issues of gender-based and sexual violence even without a specific mandate to that effect, there are many advantages to identifying such issues specifically in its legal framework.[22] Those drafting a legal framework for a truth commission should take into account the importance of gender-based and sexual violence in the history of the conflict. In most cases, it is recommended that this issue be identified specifically in a commission's mandate.[23] Additionally, it is important to ensure that a

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[18] *Comisión de la Verdad y Reconciliación: Informe Final*, vol. VI, chap. 1, sects. 5 and 8, and vol. VIII, chap. 2, sect. 1.

[19] *Report of the Truth, Justice and Reconciliation Commission* (Kenya, 2013), vol. II A, chap. 6, and vol. II C, chap. 1.

[20] See A/HRC/24/42.

[21] OHCHR, *Transitional Justice and Economic, Social and Cultural Rights* (United Nations publication, Sales No. E.14.XIV.3), pp. 17 and 21.

[22] UN-Women, *A Window*, p. 12.

[23] Rashida Manjoo, "The South African Truth and Reconciliation Commission–a model for gender justice?" (2004), p. 18. See also United Nations Transitional Administration in East Timor Regulation 2001/10, which required that a gender-sensitive approach be integrated into all aspects of the

commission's design and mandate are informed by national consultations, including with women's organizations, and to conduct a conflict-mapping exercise that documents the range of violations experienced by women.

22. Many recent commissions have built on the precedent established by Peru, setting up specialized gender units. Other truth commissions, such as the National Reconciliation Commission of Ghana, have incorporated gender concerns throughout its structure, rather than establish a specific unit. Gender units can play a valuable role as a focal point for efforts to address gender-based and sexual violence, but should not be a substitute for incorporating gender concerns across a commission's work. Some experts recommend both establishing a gender unit and taking a cross-cutting approach, as was done by the commission in Timor-Leste.

23. Partnerships with women's groups can strengthen a truth commission's legitimacy, as well as its capacity to address gender-based and sexual violence. Past commissions have benefited from the involvement of women's groups, which have made formal submissions, undertaken outreach, provided support to victims who provide testimony, drawn attention to overlooked issues, assisted with statement taking and gender training, and provided analysis on patterns of abuse. In Tunisia, women's organizations are working to document stories and provide preliminary lists and databases of women victims, to be used in the initial mapping undertaken by the Truth and Dignity Commission. In Timor-Leste, partnerships with women's civil society groups significantly strengthened the commission's work.[24] It is also important for a commission to reach out to organizations that work closely with child victims, including victims of sexual violence.

24. A commission's composition should reflect its priorities in the area of gender-based and sexual violence. Experience shows that appointing commissioners and staff who understand and are committed to addressing the gendered dimensions of conflict is vital to maintaining a proactive focus on gender-based and sexual violence. Some commissions have used quotas to ensure the representation of women as commissioners, at expert levels and as staff. Commissioners and staff who bring understanding and experience in dealing with this type of violence may also be better placed to create a supportive and enabling environment that allows victims to speak about their experiences. Female victims of sexual abuse may also prefer to speak with female statement takers, and male victims of such abuses may prefer to speak with men. This should be taken into account in staffing the teams of statement takers and in setting up hearings.

25. Internal training is also important. Many past truth commissions, including those in Ghana, Liberia, Sierra Leone and Timor-Leste, incorporated gender training for their staff. Training has covered, among other areas, international norms pertaining to gender-based and sexual violence; the history of gendered patterns of abuse in situations of conflict and repression; gender-sensitive approaches to statement taking, data collection and hearings, including support for and protection of women participants; conducting investigations that are responsive to the complex causes and manifestations of gender-based and sexual violence; and mainstreaming gender in report writing.[25] The United Nations has often assisted with expertise during such training.

26. Investigators and statement takers may need training in interacting sensitively with victims experiencing psychological stress. The experience of many truth commissions has

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commission.

[24] Nesiah and others, *Truth Commissions*, pp. 14–15.

[25] Binaifer Nowrojee, "Making the invisible visible: post-conflict justice for Sierra Leone's rape victims", *Harvard Human Rights Journal*, vol. 18 (2005), p. 93; Nesiah and others, *Truth Commissions*, p. 12.

been that women providing statements speak more often about the victimization of others, particularly family members,[26] and may leave out the stories of their own suffering. In South Africa, statement takers reminded women not to forget "to tell us what happened to you".[27] Requests to provide information to the commission anonymously should also be given serious consideration, as that may allow persons to speak about sexual abuse when they otherwise may not. Commissions should establish procedures to guarantee anonymity in appropriate cases.[28]

27. In some circumstances, alternative approaches to gather information about women's experiences in a conflict may be necessary. In Timor-Leste, where the number of women who came forward was much lower than expected, the gender unit commissioned 200 in-depth oral histories to supplement the commission's understanding of women's experiences. In Liberia, the United Nations Development Fund for Women organized peer meetings in affected communities, where women could share their experiences and have them transmitted to the Commission, rather than testifying in person.

28. Creating an enabling environment in the context of public hearings is also important. The Sierra Leonean commission held dedicated women's hearings, and funded women's groups to support those women who came before the commission. Women were given the options of testifying in camera, speaking in public from behind a screen or speaking openly to the audience.[29]

29. Addressing gender-based and sexual violence within a truth commission can also lay the foundation for recommendations regarding institutional and legislative reform in order to address an entrenched culture of discrimination.

B. International commissions of inquiry

30. Given the important role that international commissions of inquiry and similar investigatory bodies play in laying the foundation for transitional justice processes, a dedicated focus on gender-based and sexual violence by such commissions can bring about gender-sensitive truth, justice and redress measures. In recent years, there have been increasing efforts to ensure that gender-based and sexual violence is adequately addressed in the work of international commissions of inquiry. All such commissions and related investigative bodies established by the United Nations now include dedicated investigators specialized in the area of gender-based and sexual violence, with many recent international commissions of inquiry supported by UN-Women.

31. Recent commissions of inquiry, including on the Syrian Arab Republic,[30] Libya,[31] and Guinea,[32] have increasingly devoted attention in their work and reports to the issue of to sexual violence. The report of the commission of inquiry on the Democratic People's

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[26] Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (2006), p. 28; Nesiah and others, *Truth Commissions*, p. 17.

[27] Beth Goldblatt, "Evaluating the gender content of reparations: lessons from South Africa", in Rubio-Marín, *What Happened to the Women?*, p. 78.

[28] Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), principle 10 (d).

[29] Nowrojee, "Making the invisible visible", p. 94.

[30] See A/HRC/S-17/2/Add.1, A/HRC/21/50, A/HRC/19/69, A/HRC/22/59, A/HRC/23/58, A/HRC/24/46, A/HRC/25/65.

[31] See A/HRC/19/68.

[32] See S/2009/693.

Republic of Korea[33] also paid specific attention to broader gender-based violations and crimes, particularly violence against women, and the impact of violations on particular groups, including women and children.

V. Criminal justice proceedings

A. Strengthening national criminal justice proceedings

32. States have primary responsibility to exercise jurisdiction over serious crimes under international law.[34] Accordingly, transitional justice strategies increasingly focus on strengthening national capacity to prosecute crimes of gender-based and sexual violence. Specialized chambers or courts have been established, for instance, in Croatia, the Democratic Republic of the Congo, Liberia, Serbia and Uganda, and prosecution and investigatory units have been created to deal specifically with gender-based and sexual violence. In Liberia, the sexual offences act of 2008 provided for a division of circuit courts in each county to deal with sexual offences, and the Sexual and Gender-Based Violence Crimes Unit was established. The United Nations Joint Human Rights Office of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) has worked to strengthen national capacity, including by assisting military magistrates to establish mobile courts and specialized prosecution support cells. Those efforts have resulted in increasing numbers of convictions being registered.[35] In Colombia, the Attorney General's Office adopted a plan of action to defend the rights of women victims of sexual violence in the context of the armed conflict. The plan includes the establishment of a disaggregated database, the adoption of an inter-institutional model of special investigation and attention to victims that simplifies proceedings to avoid re-victimization, and the creation of a subunit for the registration, assistance and orientation of victims of organized armed groups, which fall outside the scope of the Peace and Justice Law.

33. National capacity has also been strengthened through the creation of mixed chambers, located in the national judiciary but combining both national and international expertise. In Bosnia and Herzegovina for example, the War Crimes Chamber, staffed by both national and international staff, has prosecuted sexual violence as the crimes against humanity of rape, torture, sexual slavery, enslavement and persecution.[36]

34. An important focus of national capacity-building has been training investigators, prosecutors, judges, security officials, lawyers, medical staff, social workers and other rule-of-law actors. Capacity-building trainings have been conducted with United Nations assistance, including in the Democratic Republic of the Congo, Guinea, the Sudan (Darfur), and Kosovo.[37] Furthermore, UN-Women has partnered with Justice Rapid Response[38] to

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[33] A/HRC/25/63 and A/HRC/25/CRP.1.

[34] Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 20.

[35] See, inter alia, MONUSCO and OHCHR, "Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo" (2014), paras. 29 and 31.

[36] See Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber* (2007). See also A/HRC/23/49/Add.3, paras. 55–63.

[37] Reference to Kosovo should be understood in full compliance with Security Council resolution 1244 (1999) and without prejudice to the status of Kosovo.

[38] www.justicerapidresponse.org.

train and roster experts on sexual and gender crime and deploy them to international and national justice mechanisms.

35. There is increasing awareness of the need to address the obstacles faced by victims of gender-based and sexual violence in accessing criminal accountability processes. These include the often prohibitive cost of filing complaints, and the geographic inaccessibility of police stations, medical services needed to obtain forensic evidence, and courts, particularly for women victims living in remote areas without transportation and with childcare responsibilities. Victims also need free legal assistance to pursue cases, medical care and support to manage the health impact of gender-based and sexual violence, and education about the criminal justice system so that cases are not abandoned or withdrawn due to mistaken assumptions. Innovative strategies are being adopted to address some of those obstacles. Mobile courts in the Democratic Republic of the Congo have allowed for criminal proceedings to be conducted in remote areas and specialist pro-bono legal clinics have been established for survivors of gender-based and sexual violence. Efforts have been made to integrate the provision of legal and medical services, creating "one-stop shops" for child and women survivors of such violence.[39]

36. More analysis is also needed of the potential and limitations of justice processes based on customary law. Customary justice mechanisms tend to be more accessible than formal courts, providing a means of filling the gap in judicial services to resolve minor disputes, enjoying community legitimacy and having the potential to provide culturally appropriate remedies. However, previous patterns of gender discrimination of such mechanisms make resolving gender-based and sexual violence cases through them extremely problematic. Efforts should be made to transform customary justice systems in gender-sensitive ways, and to ensure their compatibility with international human rights standards, while not allowing this to substitute for formal justice sector reform. For instance, in Uganda, the local council courts are now required to ensure that a minimum of one third of their judges are women. In South Africa, the Law Reform Commission has made recommendations for harmonization of customary law with that country's Constitution.

B. International criminal justice and its impact at the national level

37. Over the past two decades, international justice approaches to gender-based and sexual violence have undergone significant transformation. Ad hoc tribunals, the Special Court for Sierra Leone and the International Criminal Court have contributed substantially to developing the legal and normative framework for such crimes, including through innovative jurisprudence. It is now well recognized that sexual violence can constitute a war crime, a crime against humanity or an act of genocide.[40] The establishment of the International Criminal Court has been particularly significant, with the Rome Statute recognizing the international crimes of sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity.[41] Specific forms of gender-based and sexual violence directed at children,

[39] See, for example, A/HRC/25/35, on access to justice for children.

[40] See for example International Criminal Tribunal for Rwanda, *Prosecutor* v. *Akayesu*, case No. ICTR-96-4-T, 731, Trial Chamber judgement, 2 September 1998; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor* v. *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeals Chamber judgement, 12 June 2002; Rome Statute of the International Criminal Court, arts. 7 and 8.

[41] Rome Statute, arts. 7 and 8.

particularly girl child soldiers, have been highlighted. Gender-sensitive evidentiary principles have been adopted. For instance, the Rules of Procedure and Evidence of the International Criminal Court do not allow for the admissibility of evidence of victims' previous sexual conduct in sexual violence cases, establish that proof of sexual violence does not require corroboration and elaborate circumstances in which consent cannot be inferred from the silence or actions of victims (see rules 71, 63 and 70).

38. Prosecutions before international and hybrid tribunals have greatly furthered the visibility of gender-based and sexual violence, in acknowledging and condemning the harms suffered by women in conflict, and in establishing an increasingly credible avenue for securing accountability for such violence.[42]

39. International legal developments have further catalysed the enactment of national legislation criminalizing gender-based and sexual violence, and have established legal precedents and international standards for domestic prosecutions and legislative reform. In recent years, for instance, the Democratic Republic of the Congo, Kenya and South Africa have amended their penal codes to criminalize a broad range of gender-based violations.[43] On the basis of the definitions provided in the Rome Statute, various states signatories have defined these crimes in their national legislation and criminalized them. However, more work is needed, with inadequate legal frameworks in some States remaining a significant obstacle to combating impunity. Inadequate or imprecise definitions of gender-based and sexual violence can leave out certain types of violations, make successful prosecutions more difficult and exclude groups of victims. National legislation should be in line with international standards, including as regards criminalizing gender-based and sexual violence as an international and domestic crime and using gender-neutral definitions that allow for prosecutions of sexual offences perpetrated against men as well as women. It should also codify States' obligations to combat the full range of gender-based and sexual violence, including, but not limited to, those crimes recognized in the Rome Statute. In Uganda, OHCHR is providing technical advice to the International Crimes Division of the High Court to ensure that its rules of procedure and evidence are in accordance with international best practice.

40. Important lessons have been also learned about the processes necessary to conduct gender-sensitive prosecutions and support victims' effective participation. Achieving accountability for gender-based and sexual violence requires sustained political will, targeted prosecution strategies and timely collection of all types of relevant evidence, including forensic evidence. As in other transitional justice processes, training of investigation, prosecution and judicial staff is crucial. Experience suggests that many victims of gender-based and sexual violence feel more comfortable recounting their experiences to women, demonstrating a particular need to recruit more qualified female investigators. Prosecutors need training in prosecution strategy and the jurisprudence around this type of violence, and judicial staff require instruction in the interpretation of legislation and precedents and in creating enabling courtroom environments. Medical staff need training also, in the medico-legal aspects of crimes of gender-based and sexual violence, including how to gather forensic evidence and refer patients to law enforcement agencies.

41. Justice is a process, not merely an outcome, and there is increasing awareness of the need for courtroom procedures that ensure the dignity and protection of victims. Victims

[42] See, for example, A/67/792–S/2013/149, para. 112.

[43] See for example Kim Thuy Seelinger and others, "The investigation and prosecution of sexual violence" (2011). See also Fionnuala Ni Aoláin, "Gendered harms and their interface with international criminal law: norms, challenges and domestication" (2013).

should never be, or feel they have been, manipulated, used or endangered by justice processes. Courtroom protection protocols, such as voice and image distortion, anonymity provisions, use of pseudonyms, protective screens and closed court sessions can play an important role in this context. Witness protection programmes should apply before and during the trial, but also after its conclusion, and there should be follow-up mechanisms in place to track witnesses post-trial. In some cases, relocation and provision of new identities may be necessary.[44] Given the risk of witness identity being released, witnesses should be fully informed of the potential risk so that they are able to make an informed and autonomous choice about participation.

42. Victims and witnesses must also be protected from further traumatization. They should be provided with medical and psychological support, and children should receive specialist care and be called as witnesses only when their evidence is truly necessary. Judges, prosecutors, and lawyers must ensure that examinations and cross-examinations of victims are conducted respectfully and with sensitivity. The Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia provide that "a Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation" (rule 75 (D)). Victims and witnesses must also be adequately prepared for the detailed and personal questions they are likely to face, particularly given the strong social taboos around discussing gender-based and sexual violence.[45] Where child victims are involved, special measures should be taken to ensure they understand the trial process, consistent with their evolving capacities.[46]

43. Criminal justice processes should not only protect, but also aim to empower victims and witnesses. At a minimum, victims and witnesses have the right to be regularly informed about the progress and ultimate outcome of the cases. Efforts should also be made to improve victim participation in prosecutions. For instance, the International Criminal Court provides for separate legal representation for victims, and victim participation in the pretrial, trial, sentencing and reparations phases. The Extraordinary Chambers in the Courts of Cambodia also provide for a victim participation process whereby victims who become party to the proceedings have the right to claim moral and collective reparations.[47]

VI. Reparations

44. International law establishes different forms of reparation to redress gross violations of human rights law and serious violations of humanitarian law, such as restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.[48]

45. Reparation efforts have historically overlooked women and girls' needs and concerns. However, there has been an increasing recognition in recent years of the need for, and potential of, gender-sensitive reparations. Progress has taken place at the conceptual level, with the Nairobi Declaration on Women's and Girls' Right to a Remedy and

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[44] *Rule-of-Law Tools for Post-conflict States: Prosecution Initiatives* (HR/PUB/06/4), pp. 19–20.

[45] See Binaifer Nowrojee, "We can do better: investigating and prosecuting international crimes of sexual violence" (2004).

[46] UNICEF, Children and Transitional Justice Key Principles Document: For the Involvement of Children and Consideration of Children's Rights in Truth, Justice and Reconciliation Processes (2010), p. 3.

[47] A/HRC/18/23, para. 38.

[48] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principle 18.

Reparation (2007) and the Special Rapporteur on violence against women, its causes and consequences, advocating for gender-sensitive reparations.[49] Also, in 2014, the Secretary-General issued a guidance note on reparations for conflict-related sexual violence, to provide further policy and operational guidance for United Nations engagement in this area.

46. Reparations occupy a special place among redress measures in view of their potential direct impact on victims of gender-based and sexual violence.[50] As such, it is particularly critical that victims of gender-based and sexual violence be involved in the design and implementation of reparations. Victims know their needs and priorities best, and are uniquely placed to address concerns about the modalities and distribution of reparations, including with regard to ensuring that benefits are accessible, equitable and effective. Accordingly, victim consultations have been a priority in several States. OHCHR, in collaboration with local stakeholders, has conducted extensive consultations with victims of gender-based and sexual violence in Nepal, Uganda and Kosovo.[51]

47. Supporting the effective participation of victims of gender-based and sexual violence in reparation efforts first requires outreach and awareness-raising activities. Outreach efforts should begin long before the reparations programme is fully designed and must be cognizant of the obstacles to victims' effective participation in transitional justice. Supportive spaces, confidentiality protection and the involvement of staff trained in gender-based and sexual violence are essential. In Uganda, OHCHR and the Uganda Human Rights Commission have been conducting training since 2008 to build awareness of reparations, while simultaneously conducting research on the views of conflict-affected communities. During outreach, codes in local languages have been used to refer to body parts and gender-based and sexual violence, allowing victims to circumvent the taboo of speaking about sexual violence.[52]

48. The criteria and procedures for accessing reparations must also be gender-sensitive. The imposition of strict application deadlines or closed-list systems, whether linked to participation in truth commissions or otherwise, is likely to exclude some victims. In Sierra Leone and Timor-Leste, the truth commissions decided that the potential list of victims should be kept open in order to ensure the widest possible access. Similarly, due to stigma, forcing survivors to "come out" as victims of gender-based and sexual violence in order to gain access to reparations may deter many. In Timor-Leste, rather than singling out victims of sexual violence, the Commission for Reception, Truth and Reconciliation (CAVR) recommended that the reparations be available to categories including single mothers, widows, and children affected by conflict, as well as survivors of gender-based and sexual violence, adding a layer of protection and confidentiality to female victims coming forward.[53] Access criteria must also be sensitive to the difficulties women and children face in complying with formal requirements, such as providing official documentation or holding a bank account, and to literacy and linguistic barriers. In Guatemala, victims of the internal armed conflict are offered psychological assistance and rehabilitation adapted to their ethnic and cultural identity. The National Reparations Programme there has issued two

[49] See A/HRC/14/22. See also Inter-American Court on Human Rights, *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, judgement of 16 November 2009.

[50] *Rule-of-Law Tools for Post-conflict States: Reparations Programmes* (United Nations publication, Sales No. E.08.XIV.3), p. 3.

[51] See, for example, OHCHR, *Healing the Spirit: Reparations for Survivors of Sexual Violence Related to the Armed Conflict in Kosovo* (2013).

[52] OHCHR, *'The Dust Has Not Yet Settled': Victims' Views on the Right to Remedy and Reparation* (2011), pp. 26–27. See also Feinstein International Center and others, *Making Gender-Just Remedy and Reparation Possible* (2013).

[53] CAVR, *Chega!*, chap. 11, p. 41.

manuals which contain good practices and lessons learned on how to conduct interviews with victims. In Colombia, a series of measures have been adopted to address sexual violence against women committed during the armed conflict. They include the setting up of a mobile unit which provides legal and psychological assistance to women and girl victims in remote areas.

49. Reparations proceedings should adopt adequate procedural and evidentiary rules for sexual violence. Onerous corroboration burdens and requirements that victims provide legal and medical evidence are likely to make proof impossible for many victims, particularly those who have become internally displaced persons. In Morocco, the Equity and Reconciliation Commission applied a presumption that women who had been in detention had also suffered gender-specific violations and awarded additional compensation to women claimants on that basis, without victims needing to make a specific claim.[54] In the Lubanga case, the International Criminal Court held a "balance of probabilities" test sufficient to establish the facts relevant to an order for reparations against the convicted person.[55] In the case of children born of rape, as many are not told the circumstances of their birth, consideration should be given to allowing carers to claim reparations on behalf of the child, without disclosing the claim to the child.

50. Given the obstacles to effective victim participation, adopting structural incentives to encourage gender-sensitive outreach and procedures should be encouraged. In Timor-Leste, CAVR recommended that 50 per cent of reparations resources be earmarked for women to ensure that the implementing mechanism makes a sufficiently strong effort to reach women and girls.[56]

51. One particularly important insight of recent years is that gender-sensitive reparations should strive to be transformative.[57] Reparations processes and benefits should focus, where possible, not on restoring victims to pre-existing positions of inequality, but on subverting the structural discrimination that enables gender-based and sexual violence, and contributing to a more gender-equal society. In Morocco, the Equity and Reconciliation Commission chose not to adopt the concept of "heir" defined in Moroccan laws of succession when distributing benefits to victims' families, in order to accord equal treatment to men and women successors. That has subsequently been used by some organizations in defending reforms to inheritance laws.[58] In Tunisia, sustained advocacy has similarly led to the reform of discriminatory inheritance laws that affect the receipt of reparations benefits.

52. Reparations programmes for gender-based and sexual violence should be comprehensive. Combining individual, collective, material and symbolic benefits can maximize the possibilities of redress for a larger number of victims.[59] In Sierra Leone, the truth commission recommended a comprehensive reparations programme, covering free health care, educational support, skills training, microcredit and microprojects, community reparations, symbolic reparations, provision of housing and pensions and a number of gender-specific institutional reforms. In 2010, the President, Ernest Bai Koroma, publicly

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[54] International Center for Transitional Justice, *Morocco: Gender and the Transitional Justice Process* (2011), p. 36.

[55] International Criminal Court, *Prosecutor* v. *Lubanga Dyilo*, decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, para. 253 (currently on appeal).

[56] Galuh Wandita and others, "Learning to engender reparations in Timor-Leste: reaching out to female victims", in Rubio-Marín, *What Happened to the Women?*, p. 308.

[57] See A/HRC/14/22.

[58] International Center for Transitional Justice, *Morocco*, p. 36.

[59] *Reparations Programmes*, p. 22.

apologized to the women of Sierra Leone for failing to protect them during the armed conflict and pledged to protect women's rights.

53. Collective reparations may have particular potential for victims of gender-based and sexual violence. They can reach a wide group of beneficiaries, prevent stigma by avoiding the identification of individual victims, and recognize the harm to families and communities intended and caused by such violence. Individual victims should, however, directly benefit from collective reparations and not feel excluded or marginalized, or even further stigmatized. In crafting collective reparations, adequate consultations with victims of gender-based and sexual violence should take place and aim to address their particular needs, for instance for specialized reproductive health care or fistula repair.[60] Collective reparations should complement rather than replace individual reparations.

54. While reparations and development constitute two distinct and separate rights, creating linkages with development actors and programmes could be beneficial for delivering sustainable and transformative reparations, particularly in countries affected by mass violations and poverty. International cooperation and assistance should not be a substitute for the role that States must play in reparations, including acknowledgement of responsibility for violations and using their financial and institutional capacity diligently to repair the harm suffered by victims.[61]

55. Regarding the different forms of benefits distributed, experience shows that women victims often prioritize service-based benefits, such as educational opportunities and access to health and psychological rehabilitation services. Care must again be taken not to blur the distinction between reparations and social rights, services and development measures to which the general population is entitled.[62] In relation to economic compensation, the obstacles faced by women in accessing and controlling money, including not holding a bank account, and pressure from family should be considered. Material benefits that can help women pursue what they perceive to be autonomy-enhancing projects and that, therefore, can be more transformative should be also considered. In Timor-Leste, in order to empower victims sustainably, CAVR recommended the provision of economic rehabilitation services, such as skills training and microcredit, rather than monetary compensation. Symbolic reparations can also play a valuable role in acknowledging gender-based and sexual violence and in affirming the position of victims as citizens and rights holders, particularly in the context of social stigma. However, victims' confidentiality must not be breached by measures of public recognition. Reparations programmes should pay more attention to guarantees of non-repetition of gender-based and sexual violence, which are likely to focus on the underlying structural causes of violence and therefore have transformative potential.[63]

56. The effectiveness of reparations efforts in several States, including Sierra Leone, South Africa and Timor-Leste, have been bolstered by urgent interim reparations programmes. Interim reparations can be valuable in meeting the immediate needs of victims of gender-based and sexual violence, as in Sierra Leone, where some victims received access to fistula surgery. Interim schemes may also provide important insights which can be applied to the design and implementation of the relevant State's subsequent comprehensive reparations programme. In Timor-Leste, the difficulties in engaging women in the interim

[60] OHCHR, *'The Dust'*, p. 28.

[61] Guidance note of the Secretary-General on reparations for conflict-related sexual violence (2014), p. 10.

[62] A/HRC/14/22, para. 55.

[63] Ibid., para. 62.

reparations process informed many of the CAVR gender-sensitive recommendations for the proposed reparations programme.[64]

VII. Institutional reforms

57. Institutional reforms are necessary to prevent the repetition of gender-based and sexual violence, build sustainable peace and re-establish trust between victims and State institutions, which may have perpetrated gender-based violence. Institutional reforms also have important transformative potential. By focusing on the prevention of future violations, they can trigger discussion about the causes of gender-based and sexual violence, prevent the normalization of such violence in the post-conflict context and contribute to building a more inclusive and gender-just political order.

58. In recent years, there has been increasing awareness of the need to address gender-based and sexual violence as part of justice and security sector reform. Furthermore, the Team of Experts on the Rule of Law and Sexual Violence in Conflict, established in 2009 pursuant to Security Council resolution 1888 (2009), has provided technical advice and capacity-building assistance in, inter alia, the Central African Republic, Colombia, Côte d'Ivoire, the Democratic Republic of the Congo, Guinea, Somalia and South Sudan.[65] In the Democratic Republic of the Congo, for instance, the Team provided support to investigations and prosecutions by military magistrates and military mobile courts, and assisted the national authorities in the development of an implementation plan for the joint communiqué on the fight against sexual violence in conflict signed by the Government and the United Nations in March 2013.

59. Security-sector vetting must disqualify individuals who have perpetrated gender-based and sexual violence.[66] Failure to do so puts women and children at risk of further violence from those actors, constitutes a significant barrier to seeking justice assistance from the State, erodes public faith and confidence in rule-of-law institutions, humiliates victims, and sends the message that gender-based and sexual violence is socially acceptable.[67] Conversely, the disqualification of perpetrators from security roles can itself constitute a measure of satisfaction to victims.[68]

60. Furthermore, structural reforms to enhance institutional accountability will often be necessary. This may include developing professional standards of conduct, complaint and disciplinary procedures and oversight mechanisms. For instance, initiatives in Liberia, Sierra Leone and Kosovo have harnessed the opportunity that institutional reform presents to increase the participation of women in security and law-enforcement forces,[69] recognizing the links between improved gender parity, higher rates of reporting of gender-based and sexual violence, and improvements in institutional gender-sensitivity.

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[64] Wandita and others, *Learning to Engender*, pp. 309–310.

[65] See the annual report of the Team, available from www.stoprapenow.org/uploads/advocacyresources/1399901202.pdf.

[66] Integrated technical guidance note on gender-responsive security sector reform. See also A/67/792–S/2013/149, para. 128 (f).

[67] See A/67/792–S/2013/149, para. 7, in which the Secretary-General notes that incidents of sexual violence have occurred where improperly vetted or trained security forces or ex-combatants have been redeployed or cantoned in proximity to civilian centres.

[68] *Rule-of-Law Tools for Post-conflict States – Vetting: An Operational Framework* (HR/PUB/06/5), p. 5.

[69] UN-Women, *Gender-Sensitive Police Reform in Post-conflict Societies* (2007), pp. 2, and 6–7.

61. The criminalization of all forms of gender-based and sexual violence, including rape in marriage and domestic violence, has been recognized as necessary to break the silence around and create a mandate to prevent and punish such violence. National laws should be harmonized to ensure consistency and clarity. Policy and contextual obstacles, such as requirements for medical certificates in rape cases, should similarly be reformed.[70]

62. Gender-sensitive training and capacity-building for security sector and law enforcement institutions to respond to gender-based and sexual violence is critical. In Rwanda, standard operating procedures for child, domestic and gender-based and sexual violence have been developed, along with a training curriculum. An important development has been the establishment of women's police stations or specialist gender-based and sexual violence units in the police and military in Liberia, Rwanda, Sierra Leone, Timor-Leste and Kosovo. The units are often staffed exclusively by female officers, or specially trained staff, and both directly support victims' access to justice and contribute to raising awareness about gender-based and sexual violence in the community and the institutions. In Kosovo, the creation of a police gender desk helped bring human trafficking and forced prostitution into the open.[71] In Rwanda, the Gender Desk of the military has conducted training on women's rights and gender-based violence for almost 5,000 members of the armed forces, as well as civilians, with support from the United Nations.[72] More efforts are needed to ensure that those units are adequately resourced, including with appropriate physical and communications infrastructure, such as private interview and medical examination spaces. Additional support is needed within the justice sector to enable effective prosecution of cases.

63. Notwithstanding the importance of justice and security sector reforms, institutional reforms must also focus on ending gender discrimination more broadly, including through constitutional guarantees of gender equality, repealing discriminatory legislation, and adopting laws and policies which advance women's rights. For example, reforms that strengthen women's rights in relation to marriage, divorce, land and inheritance can contribute to addressing the economic insecurity and dependence that leaves women vulnerable to gender-based and sexual violence.

VIII. Conclusions and recommendations

64. **There has been notable progress in addressing gender-based and sexual violence by transitional justice processes, for instance, by focusing on the effective participation of victims of such violence and their particular needs, and striving to have a transformative impact. Recent examples show that greater attention has been given to such violence and some good practices have developed. Nevertheless, more efforts are needed to ensure that transitional justice processes address the full spectrum of gender-based and sexual violence. The good practices highlighted in the present study should be emulated in other countries concerned, while taking into account the specific national context. The study also contains recommendations about how transitional justice measures can be improved to address gender-based and sexual violence.**

65. **States play an important role in shaping the legal framework of new institutions and undertaking reforms. Judges and prosecutors, as well as legislators**

[70] See for example A/67/792–S/2013/149, para. 35.

[71] UN-Women, *Gender-Sensitive Police Reform*, p. 5.

[72] UN-Women, *Case Studies of Gender-Sensitive Police Reform in Rwanda and Timor-Leste* (2009), pp. 2 and 11.

and the executive, should adequately address gender-based and sexual violence in their work. Transitional justice mechanisms, operating independently, should fully take into account issues of gender-based and sexual violence in their methods of work, operational structures, priorities, recruitment procedures, analysis, findings and recommendations. Civil society and other independent bodies should also play a role, for instance in raising awareness of, advocating for and supporting the inclusion of issues of gender-based and sexual violence in transitional justice processes.

66. **It is recommended that the Human Rights Council retain its focus on how the United Nations system addresses the various components of transitional justice in practice, through reports by OHCHR.**